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Nos. 37 and 41

Supreme Court of the United States

OCTOBER TERM, 1964

TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

DARLINGTON MANUFACTURING COMPANY; DEERING MILLIKEN, INC.; DEERING MILLIKEN & COMPANY, INC.; AND NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

DARLINGTON MANUFACTURING COMPANY; DEERING MILLIKEN, INC.; DEERING MILLIKEN & COMPANY; TEXTILE WORKERS OF AMERICA, AFL-CIO.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN TEXTILE MANUFACTURERS INSTITUTE AS AMICUS CURIAE

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STATUTE:

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I.

INTRODUCTION

This brief *amicus curiae* is submitted by the American Textile Manufacturers Institute with the consent of the parties, pursuant to Rule 42(2) of the Supreme Court Rules.

II.

INTEREST OF AMERICAN TEXTILE MANUFACTURERS INSTITUTE

The American Textile Manufacturers Institute (hereinafter the "Institute") is the central trade association for manufacturers of textiles made from cotton, man-made fiber, and silk. The Institute represents approximately 85 per cent of the basic textile industry in the United States.

The Institute usually avoids involvement in the private litigation of its individual members. However, in a case of vital importance to the industry as a whole, the outcome of which will have a lasting effect upon the future of the textile industry generally, the Institute has the responsibility of representing the interests of all its members. The Institute feels strongly this is such a case. It presents issues of far-reaching importance not only to the operation of American enterprise generally but, most particularly, to the American textile industry and this *amicus curiae* brief is filed for the purpose of presenting to the Court the views of this industry.

III.

STATEMENT

1. The status of the Darlington cases.

These cases arose out of events occurring in the latter part of 1956. After extensive hearings over five years and three Trial Examiner's intermediate reports (two "supplementary" to the first), the National Labor Relations Board (hereinafter the "Board") ruled that Darlington Manufacturing Company (hereinafter "Darlington") violated the National Labor Relations Act (hereinafter the "Act"). The violation

consisted of permanently and totally closing down Darlington's one and only textile mill and, thereafter, in accordance with South Carolina law, disposing of its assets, liquidating its operations, and dissolving its corporate existence.

The Board also ruled that Deering Milliken, Inc. (hereinafter "Deering Milliken"), Darlington's New York selling house and, a substantial stockholder[1] in Darlington, was legally responsible for the unfair labor practices of Darlington although not itself in violation of the Act. The Board directed its remedy toward all of Darlington, Deering Milliken, Inc. and other "affiliated corporations" which also used Deering Milliken as a selling house.

The Fourth Circuit Court of Appeals refused to enforce the Board's order. The Court ruled "that the decision to close the plant was not an unfair labor practice" (R. 1898). It similarly declined to enforce the Board's findings that Darlington had violated Sections 8(a)(1) and (5) because "remedies for these offenses are not now available as Darlington is no longer alive".

This brief is in two parts:

(a) A factual statement of general conditions and practices in the textile industry before and after dissolution of Darlington which seem relevant to consideration of the issues before this Court; and

(b) A brief legal discussion of the application of the law to these conditions and practices in the *Darlington* case.

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[1] Deering Milliken acquired its stock by virtue of a bankruptcy proceeding in 1937.

2. The problems of the textile industry.

The Institute recently published its annual review of the cotton textile industry entitled "Ten Years of Cotton Textiles" (1954-1964). The following excerpt is an accurate technical description of the economic conditions of this industry starting two years before the Darlington liquidation (November *1956*) and coming up to date:

> "'Profitless prosperity' described the markets at the start of the decade. Years of liberal production had followed the 1949 depression, but in 1954 this was petering out with meagre earnings, constant and relentless pressure upon the price structure, and new issues which were to afflict the industry over the coming years.
>
> "Negotiations of Japan's accession to the General Agreement on Tariffs and Trade was begun in 1954. It culminated in a September 11, 1955 slash of 25-to-50 per cent in most United States textile duties. Imports boomed and the long pattern of their expansion to embrace not only Japan but more than three score nations was set, leading finally to the international textile arrangements effective in October, 1961.
>
> "Also in 1954 federally-held raw cotton stocks were rising dangerously and the first pressures were placed on government to bridge with an export subsidy the widening gap between its high domestic support price and the lower world market. For more than eight years, beginning in January, 1956, and extending into 1964 domestic mills were to bear the cross of two-price cotton. Supported with a high government "loan" to growers, the fiber was available to home mills only at the loan rate or better prices, as the law excluded them from significant access to the world market. To foreign spinners government made cotton

available at the world price, picking up the tab for 6¢, 8¢, or 8½¢ a pound, or on a bid basis.

"Subsidized by some 25 per cent of the value of their raw cotton, refurbished with equipment largely new, armed with wage costs a fraction of those in America, and with tariff walls lowered to stepping-stone level, the invitation was out for the foreign spinner, weaver, and garment manufacturer to glut American markets with cut-price goods. This was to cost United States cotton interests 3,503,700 bales of business with domestic mills in the decade, 1,279,600 of this in the years 1962 and 1963 with the international arrangements then in effect. It was to cost domestic mills literally billions of yards of domestic and export sales. It was to cost the nation untold amounts in lost productive facilities, jobs, and taxes."

The following charts from the Institute's publication "Textile Hi Lights"[2] illustrate graphically the conditions described in the above text. On each chart is noted the point, *October 1956,* when the stockholders of Darlington voted to liquidate.

[2] Winter 1964.

CHART A

MILL INVENTORIES vs WEAVERS' MARGINS AND PROFITS

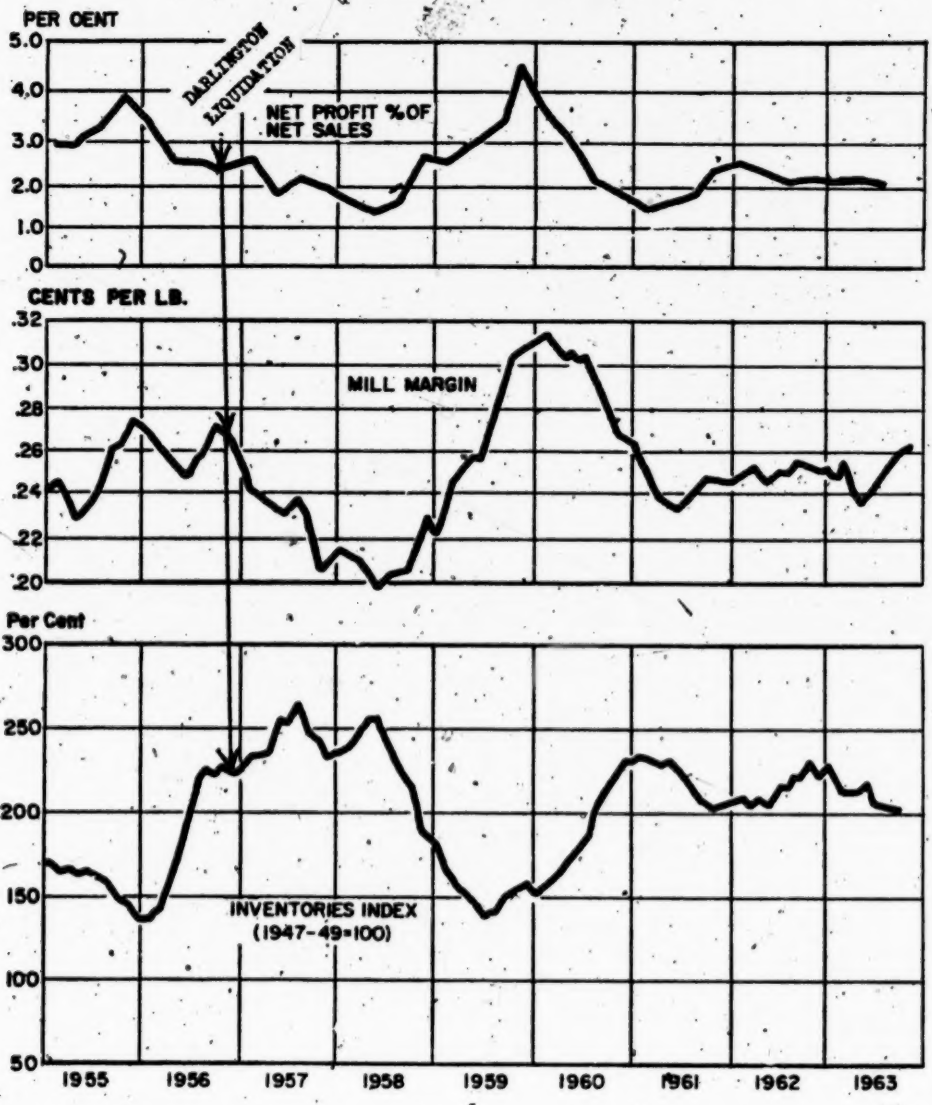


CHART A

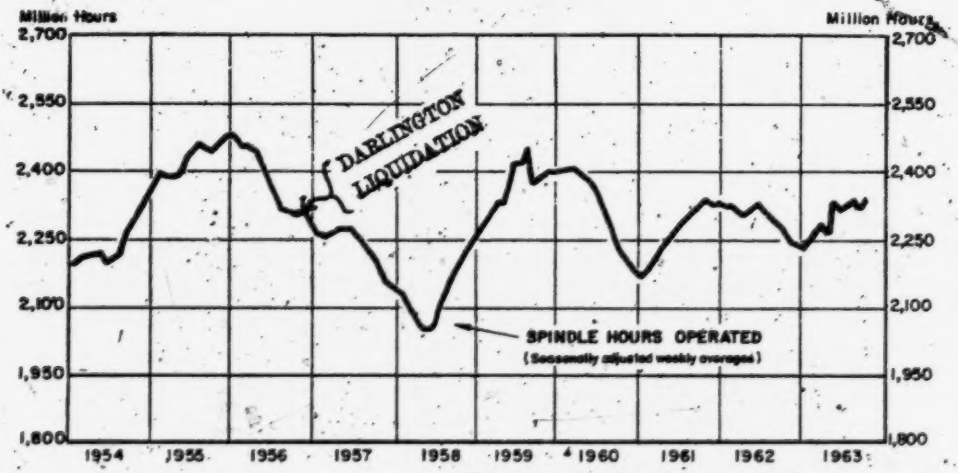
NET PROFIT ON NET SALES[1]

(per cent)

Year \ Quarter	1st	2nd	3rd	4th	Average
1955	2.9	2.9	3.3	3.9	3.3
1956	3.1	2.5	2.5	2.4	2.6
1957	2.6	1.8	2.1	2.0	2.1
1958	1.6	1.4	1.6	2.7	1.8
1959	2.6	3.1	3.4	4.6	3.4
1960	3.6	3.0	2.1	1.9	2.7
1961	1.5	1.6	1.9	2.4	1.9
1962	2.5	2.2	2.1	2.3	2.3
1963	2.2	2.2	2.1		
Average 1955-62	2.5	2.3	2.4	2.8	

[1] Average of Standard and Poor's six Textile Weavers (Burlington, Cone, Dan River, Lowenstein, Reeves and Stevens, each given equal weight). Data formerly based on partial estimate now based on actual quarterly figures.

CHART B
SPINDLE ACTIVITY
ON COTTON SYSTEM



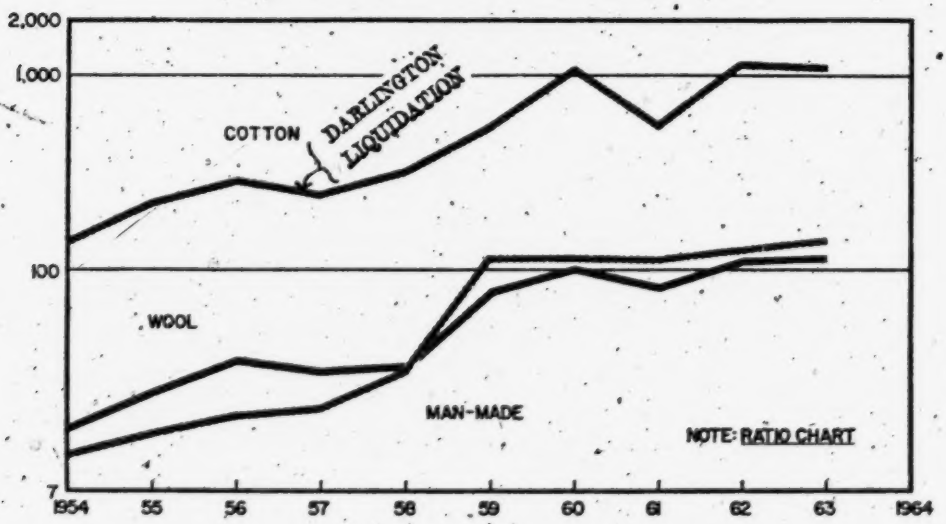
Crop Year (August 1-July 31) or Month	Cotton System Spindles	
	Spindles in Place (at end of period) (in thousands)	Spindles Active
1950-51	23,195	22,140
1951-52	23,205	21,298
1952-53	22,903	21,423
1953-54	22,694	20,626
1954-55	22,273	20,716
1955-56	21,903	20,557
1956-57	21,195	19,760
1957-58	20,845	19,241
1958-59	20,300	19,166
1959-60	19,956	19,228
1960-61	19,603	18,986
1961-62	19,489	18,761

SOURCE: Bureau of the Census, U.S. Department of Commerce.

CHART C

U. S. IMPORTS OF TEXTILE MANUFACTURES

(MILLION EQUIVALENT—SQUARE YARDS)



U.S. IMPORTS OF TEXTILE MANUFACTURES

(millions of equivalent square yards)

Year	Cotton	Man-made	Wool	Total
1954	202	19	32	253
1955	362	28	46	436
1956	450	34	60	544
1957	398	38	55	491
1958	492	52	57	601
1959	720	134	91	945
1960	1,054	132	111	1,297
1961	722	121	93	936
1962	1,166	168	145	1,479
1963	1,100	203	158	1,461

Source: U.S. Department of Commerce unit import data to equivalent square yards.

What these charts tell is clear. When the Darlington stockholders voted to liquidate, the chief factors of rising costs and foreign competition had brought the textile industry as a whole perilously near the disaster stage.

Until legislative changes of 1964 such cost increases and intense foreign competition have kept the textile industry generally in a steady decline since World War II. Compared to other industries profits have been wholly inadequate both from the standpoint of percentage of sales and return on investment.[3] The number of spindles in place has declined from about 23 million in 1954 to 19 million in 1964.[4] The production of square yards of cotton textiles by the domestic industry was less in 1963 than it was in 1954 even though the domestic population has increased over 26,000,000.[5]

Employment in the industry has correspondingly decreased. The industry employs 440,000 fewer workers today than in 1946.[6] One-third of these people have been terminated because of closings like Darlington of uneconomic mills. The other two-thirds have been displaced because of automation and related technological developments, much of which has been accelerated by the profit squeeze on the industry.

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[3] Chart A illustrates the low profit yield during these years. The years 1956 through 1958 (just before and after Darlington liquidated) were particularly depressed.

[4] This is due partially to liquidation and partially to modernization. See Chart B.

[5] 1954 census 163 million; 1963 census 189 million.

[6] Economic Effect of Textile Mill Closings, U. S. Dept. of Commerce 1963, p. 1.

Flexibility, even to the point of going out of business, has always therefore been necessary in the textile industry. For varying reasons, primarily economic, although partially through obsolescence (both reasons existed in Darlington's case) the post war years have seen an alarming rate of mill closings in this industry. More than 670 textile mills like Darlington were closed between 1946 and 1960. There were over a hundred closings in the year 1955 alone (the year before Darlington closed). In the South during this 1946 to 1960 period, there were over 200 closings.[7]

Technological advance, improved methods and production flexibility to meet fast-changing fashion markets are indispensable to maintain the textile industry. In some places, these meet with employee and community resistance as the cottage weavers destroyed the first spinning jennies. The profit ratio of the industry does not attract new investment capital except where cooperation of employees can be expected. Therefore, there is a vital link in any modernization or expansion program to the attitude of employees. If there will be resistance, then modernization is likely to fail and the new capital would be better invested elsewhere. Management dare not ignore or neglect these realistic and practical considerations.

The industry is both the oldest in this country and also one of the first to be established in any underdeveloped country. The industry in the United States

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[7] *Problems of the Domestic Textile Industry*. Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 87th Congress, 2d Session, February 6-7, 1961, pp. 301-305.

until recently had a disproportionate amount of old and inefficient plants. For instance, the Darlington mill involved in this case was built in 1883.

On the other hand, with enthusiastic United States foreign aid, practically every rehabilitated or underdeveloped country has since World War II acquired and now operates modern textile mills. Even the invention of still more efficient machinery has been developing in these countries.

In addition to liberal foreign aid from World War II on, the textile industry has been suffering from two other U. S. Government policies. The first is a tariff policy favoring freer trade with larger imports of the new textile exports of the underdeveloped countries. The second is a domestic agricultural policy of supporting the price of cotton which has given overseas mills in the cost of their U. S. cotton a 25 per cent price advantage over U. S. mills.

The charts show that a major contributing factor to the economic troubles of the textile industry has been the phenomenal rise in textile imports in the last 10 years. At the time of Darlington's liquidation this was a pressing problem.

Applying those facts to the decision of the Darlington shareholders to liquidate, the charts show that in 1954 approximately 202 million equivalent square yards of cotton textiles were imported in the United States. By 1956, when Darlington finally liquidated, imports had reached 450 million equivalent square yards, an increase of 100 per cent in just two years. (By 1963, the figure would reach 1 billion 1 hundred million square yards.)

Unfortunately, the reverse was true of our export markets. Cotton cloth exports went down from 605

million square yards in 1954 to 506 million square yards in 1956. (The 1963 figure would be down to 369 million.) This foreign competition, with its cost advantages because of substandard wages and lower world market prices on raw materials, is largely responsible for the long years of difficulty for the domestic textile industry. As the figures above indicate, its effects first began to intensify in the period immediately preceding Darlington's liquidation.

The inroads of imports from abroad have already taken such a permanent segment of the market for low grade goods that the domestic industry has in substance been required to find markets more and more in higher grade goods which are fundamentally components of a high risk fashion business or swiftly changing technological development of new and mixed fabrics. The fashion business and technological change have in turn put new demands upon production management to be able to adapt to sudden turns in markets and to depend more and more for selective marketing upon specialized selling houses in New York.

The textile industry is, therefore, of all American industries, the industry in which management freedom for immediate management decision—for "turning on a dime"—is the most indispensable and in which labor flexibility and costs are disproportionately determinative over other costs in profit or loss.

3. The function of the selling house.

The textile fashion industry is so highly competitive on the domestic scene as well as abroad that sales and sales promotion are of the utmost importance.

As the earliest industry of the United States, the textile industry is made up of hundreds of small and large companies with over 7,000 individual establishments located in 43 states. The number of small companies is probably higher than that which exists in any major manufacturing industry. Yet the bulk of the textile market is localized in the New York City area. Thus, through the years, it has been a practice in the industry for mills or companies to contract with a New York "selling house" for their merchandising including the discounting of their accounts receivable. These selling houses frequently contract with numerous mill customers for exclusive merchandising of the particular products of their particular mills under the selling agent's brand name. The purpose of the arrangement is to accomplish more effective and efficient merchandising by utilizing the existing facilities of the selling house and its expert knowledge of the fluctuating fashion market to avoid the expense of a separate sales operation for each mill or each company.

The textile industry from earliest times has consisted of great numbers of widely scattered plants with varied products. Early mills sought distribution by consigning goods to storekeepers in various New England commercial centers who acted as selling agents. For mills then pioneering the technique of mass production the inadequacies of this service, in which no certainty of volume markets or certainty of payment of accounts accrued to the mill, were quickly apparent.

The next big step in distribution was use of wholesale commission merchants in the big Philadelphia, Balti-

more, and New York centers which with the opening of Western trade were providing surer outlets for substantial amounts of factory made goods. This was an improvement. But the relationship suffered as recurring manufacturing surpluses left these dealers with only periodic public auctions as a means of sale, a method of dubious value for the manufacturers.

The mill selling house, which devoted its full time to the needs of its textile mill clients, developed during the War of 1812 as the truly effective answer to sales problems of the industry, and has continued so with few modifications to the present. The selling houses pioneered mass marketing skills suited to the skills of mass factory production in the mills. They brought stability to existing mills and provided the base for further industrial expansion. Their position and value in textiles have been recognized as almost unique in American industry and remain so today.

Selling houses today are centered in New York City, which for a century has been the central marketplace for woven textiles in which mill representation is regarded as vital to successful operation. The prime task of these houses is of course sale of the products of mills they represent, through New York, through branches of the selling house in other American centers, frequently today through foreign branches or export divisions. Thus, the products of these thousands of plants at distant points are effectively, efficiently, and competitively distributed to thousands of customers throughout this nation and the world.[7a]

No less important than the actual sale, however, is the likewise historic task of advising the mills. The

[7a] During World War II, the textile industry supplied 10,000 different items to the armed services.

textile industry makes countless constructions and fabrics and countless finishes for a vast list of end uses. Fashion affects apparel and household lines. New technical developments affect industrial fabrics. There is a constantly growing list of new fibers with new properties and values. No period prior to the last two decades has been more explosive in technical development and complexity of the market mix of fiber, fabric, and finish. And it is at the market level, in a ferment of ideas between customers and selling houses, that a great part of this development takes place.

It is a duty of the selling house, therefore, to keep the mill posted on all matters affecting its products and market opportunities. Knowing the range of the mill's equipment, it must advise the fabrics or constructions which it feels will be most wanted in the future. It may advise on whether they should be sold in the loom state, or to contract for finishing and sell in the finished state. It may counsel on shifts from one fiber to another, or to blends. This calls too for such advice as the seller can give on the probabilities of supply, demand, and price in the general market. Thus, the sales organizations serve as professional business advisers and market counselors to the mills they represent.

The selling house from the earliest times has assumed financial responsibility for marketing, and in nearly all cases today guarantees the credit of the customer back to the mill. Historically, selling houses have been bankers to mills, and through their location in New York City may today assist mill clients in financial matters. Other services also are provided: collections handled, records kept, claims investigated,

adjustments made, and technical, market research, promotion and advertising provided as needed.

It is only through selling houses that the nation's independent mills are able today on a commission basis to obtain a well rounded merchandising service.

The arrangement of these independents with the selling house is usually stated by contract. The house in nearly all cases is given the exclusive sales agency for the mill. Commission rates are stated, a low rate on gray goods, slightly higher on finished goods, the highest rates usually on ready-for-the-consumer products. The mill retains complete control over its prices, products, pattern of distribution, and hours of operation. The selling house may advise on any or all of such matters. Usually no sale to a customer is binding until accepted by the mill.

Some independents have sold through their present selling house or its antecedents for as many as 60 years. There are many of these independent mills. No one in the absence of a thorough survey knows the exact number. They are widely scattered. They cannot effectively operate without a selling house. Most of them are small plants. Those known to us range mainly between $3 and $6 million dollars of sales with some up to about $10 million.

It is not at all unusual in the textile field for groups of mills selling through a single selling house to be referred to as "this group" or "that group," *e.g.*, the "Deering Milliken group". Many of the so-called groups have overlap of stockholdings. This sales practice of the industry is in no way inconsistent with the various participating mills being independent as to their labor practices; labor relations are not affected by such arrangements.

The selling house complex is the merchandising system of the textile industry. It is unique in many ways. It has been hammered out in the market place of experience. Upon it, with all its attendant services and facilities, a great industry and its employment potential depends.

THE QUESTIONS PRESENTED

Against this background there are three basic questions before the Court which are of fundamental importance to this particular industry.

1. Did Congress intend in the Act that a corporate employer should not have the right to go out of business for whatever reason?
2. Did Congress intend in the Act that a corporate employer should not have the right to consider the advent of a labor union as a realistic economic factor in reaching a business decision concerning the operation or discontinuation of a business?
3. Did Congress intend in the Act that a selling house for a group of textile manufacturers and all manufacturers in the same selling group incur liability for the unfair labor practices of one of the manufacturers in the group?

IV.

ARGUMENT

A. A corporate employer has the right to discontinue a business operation, liquidate and go out of business for whatever reason.[8]

The Board has held in this case that an employer commits a violation of the Act by closing its only plant,

[8] Since the particular situation of the textile industry is peculiarly relevant to the second and third questions presented, we shall treat summarily the argument on this first point.

selling the assets at public auction, liquidating the corporation and distributing the proceeds to the stockholders. The Board has so ruled in this case on the ground that an employer whose employees have designated a union as their representative does not—like other employers—have the right to discontinue business if a contributing factor is the advent of a union. Significantly, this case contains the additional proposition that this rule applies even though admittedly the employer is losing money and the economic future of the company is in serious jeopardy.

It is a shock to this industry that it could seriously be considered that a law of the United States could be construed now—for the first time since its enactment nearly 30 years ago—to mean that the stockholders of a company are not free for any reason to discontinue a business venture and withdraw their capital investment. The essence of the competitive system is the right of an entrepreneur to venture his capital in a business or profession of his choosing and endeavor to succeed to whatever extent his abilities permit him. But the necessary correlative is that he be able to withdraw from that pursuit, with or without failure, if he wants to. The denial of that right in this case by the Board concerns not only the textile industry but our entire industrial and investing system.

Certainly it could not constitutionally be suggested that a law of the United States could be construed to require an individual employee to remain in the employment of an employer against his wishes.

Certainly an individual or partnership employer could no more be compelled to the involuntary servitude of providing employment for employees than the

individual employee could be compelled to work for an employer, individual or corporate. Is it possible to conceive that the Congress intended a different rule in this respect for the corporate form of doing business that is the backbone of the business life of the nation?

The ruling of the Board in these cases was properly set aside by the Fourth Circuit Court of Appeals upon the basis that correlatively with an individual employee, an employer even if a corporate person has an absolute prerogative, to go out of business.

B. Congress did not intend that a corporate employer should not have the right to consider the advent of a labor union as a realistic economic factor in reaching business decisions concerning the operation or discontinuation of a business.

While their position is not entirely clear, the Board and the Union would apparently have this Court reverse the ruling of the Fourth Circuit Court of Appeals on the ground that a corporation's right to go out of business is not effective where the employees' choice to bring in a union is one of numerous considerations of an employer in his overall decision to quit business.

It is impossible that a realistic Congress could have intended this. All legislative history is to the contrary.

A company or its management cannot function without the right to consider the advent of a union as a realistic economic factor in arriving at business decisions over the conduct or discontinuation of a business operation. The Union contends that when they realistically and honestly take the projection of a

union's demands into their economic calculations, investors may be compelled by statute under the Constitution to continue an unprofitable business even though the business judgment of management on *all* relevant factors would dictate liquidation. The far-reaching effect of such a ruling by this Court would cast a shadow upon *all* matters of business judgment and management affairs. Such a challenge could not be considered to confine itself to the decision to liquidate —to quit. Management and investors would have to project it to extend to the decision of the manner in which their business could go on.

Shall we expand this year? Shall we put in new machinery or remodel the old? Shall we go into this venture or that? Shall we manufacture print cloth or tent material? Shall we produce one product or 100? Shall we turn out goods for inventory or only on definite orders? Do we employ 10 people or 1,000? Do we operate five machines or 500? If we are overproducing, do we cut back production? If a commodity is unprofitable, do we continue to produce it because it gives us a complete line or do we discontinue it?

All of these, and many others, which constantly arise, are questions which require the application of business judgment. Traditionally and properly, they call for decisions from those charged with the management of the business. The success or failure of the business—and the employment potential—depends upon the skill with which such decisions are made. Any such business judgment if it is to be accurate must take into account *all* realistic factors involved.

The Board's decision casts a shadow of indefinite length upon an employer's ability to make any de-

cisions. If the Board can control the right to quit altogether, the shadow of things to come is that the Board can certainly control the way—or the right—to go on.

Various courts of appeals have fully appreciated the perversion of Congressional intent in the Board's refusal—in its eagerness to assist union organization—to allow businessmen honestly to consider unionization as one of many economic factors in a decision to quit. All courts that have considered the question have reaffirmed the employer's right to consider and act upon the economic ramifications of the entrance of a union into his plant. See *NLRB* v. *Lassing*, 284 F. 2d 781, 783 (8th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *Jay Foods, Inc.* v. *NLRB*, 292 F. 2d 317, 320 (7th Cir. 1961); *Mount Hope Finishing Co.* v. *NLRB*, 211 F. 2d 365, 372 (4th Cir. 1954); *cf. NLRB* v. *Rapid Bindery, Inc.*, 293 F. 2d 170, 175 (2d Cir. 1961).

The most recent rebuke delivered to the Board in its effort to divorce its promotion of union organization from economic realities was *NLRB* v. *New England Web, Inc.*, 309 F. 2d 696 (1st Cir. 1962). There, a textile employer already beset with considerable and persistent economic problems was faced with the unionization of his only plant. The First Circuit, reversing the Board, said (*Id.* at 701) that unionization "was assuredly a new factor to be considered by the New England Web management in determining a future course of action." Therefore, the court concluded that it was not improper, as the Board had suggested, for the company to evaluate the effect of "the advent of the union . . . (on) its already precarious cost picture" (*Ibid.*).

Courts have held it does not make any difference if the final decision to terminate operations is not made until after the advent of a union becomes a certainty (*e.g.*, after an election). Employers are not penalized for not making a decision definite until the problem becomes definite. *NLRB* v. *Rapid Bindery, Inc., supra,* at pages 173-74; *NLRB* v. *New England Web, Inc., supra.* It does not matter if the form of the decision is also not determined until after unionization becomes a fact. Employers are not penalized because they did not have the particular action that was taken under consideration prior to the advent of the union. See *New England Web, supra,* at 701.

Nor would it matter that in this particular case the exact demands the Union would have made on Darlington were not known when the decision to shut the mill was made. Here, despite the Examiner's ruling that the company had no right to anticipate union demands, the record is clear that this union had, during its campaign, promised greater pay, improved working conditions and, particularly, resistance to any and all management attempts to change work assignments along with the introduction of new equipment. (See R. 64.) It is true that an employer may not view campaign promises as inflexible positions that cannot and will not be affected by collective bargaining. But the law is clear that an employer is not acting arbitrarily or unreasonably when he alters his method of operations in the face of a reasonably anticipated increase in costs. *NLRB* v. *Lassing, supra,* at 783. The law does not require that an employer take no action until those costs actually materialize. See *New England Web, Inc., supra,* at 702; *NLRB* v. *Adkins Transfer Co.,* 226 F. 2d 324, 328 (6th Cir. 1955); *NLRB* v. *R. C. Mahon Co.,* 269 F. 2d 44, 47 (6th Cir. 1959).

The textile industry in particular cannot help but understand the Board's interpretation of the Act to mean that an American businessman if he realistically takes the incidence of a union into business calculations must stay in business until the last drop of economic life or the last expectation of profit vanishes. This argument has been as unsuccessful as it is unrealistic. It has been rejected in all other cases that have involved the charge that the owner of a single plant violated the Act by completely and permanently shutting it down. *Mount Hope Finishing Co.* v. *NLRB, supra; NLRB* v. *New England Web, Inc., supra; NLRB* v. *Neiderman,* 334 F. 2d 601, 604 (2d Cir. 1964). It should be rejected in this case.

C. Congress did not intend that a selling house for a group of textile manufacturers and all manufacturers in the same selling group should be treated as a multiple-plant employer with common liability for the unfair labor practices of each of the manufacturers in the group.

In 1956 when Darlington liquidated, Deering Milliken & Co. was a selling house with no manufacturing facilities of its own. If, as the union argues in this case, such a selling house relationship creates a multiple-plant "single employer" with a common responsibility upon all customers of the house for the labor violations of any member of the group, the merchandising mechanism of the textile industry is in jeopardy of endless litigation over common liability and responsibility in other directions.

The relationships and the factors relied upon by the majority Board decision and the dissenting Court opinion to find "single employer" liability are relationships commonplace in selling house arrangements in the textile industry. These relationships, conduct,

services, and interchange of functions have been a part of this selling agent system for more than 100 years. A colloquialism like "Deering Milliken group" by which mills are known in the trade should not determine or alter the legal status of their members.

The system has always been considered to maintain the independence of mills such as Darlington. It has never been considered to involve the labor relations of any mill. It has never been considered to constitute its members a multiple-plant operation.

But if the corporate veil is to be pierced to assume that producing mills and their selling house are a multiple-plant operation for Labor Act purposes a new precedent is created to constitute them a single operation with common liability and responsibility for other purposes.

This new precedent for the enormously important law of vicarious liability will have been based on Board finding that a multiple-plant single employer status exists in the Deering Milliken selling group. That finding will have been made by a 3-2 vote of an administrative agency (after a post-election membership change) overruling a "clear" finding to the contrary by its Trial Examiner and without any review of the administrative finding by an appellate court.

If, as the Board decision in this case holds, liability may now be assessed across corporate lines on the basis of relationships such as those of a selling house group, then an important part of the settled marketing system of the textile industry may have been rendered legally too risky to be viable. Any such result bringing into question the traditional relationship and services which have been hammered out in highly competi-

tive markets would be highly disruptive and injurious to the industry. That unhappy effect would be particularly untimely for this textile industry as it is recovering from other innovations in government policy.

We find nothing in the legislative history of the Act or in the decided cases to date to justify any statutory interpretation that Congress intended any such result.

Respectfully submitted,

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